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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 989

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .....

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent to the Court:

A. Summary Statement of Matter Involved.

Petitioners were indicted in the Southern District of New York for conspiracy to obstruct justice and to intimidate witnesses in a pending Federal criminal case in that District. There were two trials in the case at bar. The first trial lasting from June 17-28, 1940 resulted in the discharge of the jury during their deliberations. No reason for the discharge of the jury appears in the record, the minutes merely showing that eleven jurors returned to the court room and were discharged. When petitioners were placed on trial a second time, they filed a plea of double jeopardy

which was summarily overruled. The second trial then proceeded and resulted in the conviction of petitioners. The judgments of conviction were affirmed by the Circuit Court of Appeals for the Second Circuit. Petitioners assigned as error the overruling of their plea of double jeopardy, and contended that in the absence of Federal precedents there should be applied the common law rule that the reason for the discharge of the jury must be entered of record so that the propriety of the discharge may be reviewed. The Circuit Court of Appeals rejected the common law cases and laid down a new rule, that where eleven jurors return to the courtroom and are discharged without apparent reason, it must be inferred (1) that one of the jurors had become incapacitated to a degree which disabled him from continuing, and (2) that the judge properly exercised his discretion in ordering a mistrial. Such a holding destroys the long established rule that juries may not be discharged except where "manifest necessity" is shown, and that the discretion of the trial court is a controlled discretion.

As to petitioner Hatios, the Circuit Court of Appeals held that although there was no direct evidence whatever of conspiracy with the other appellants, conspiracy with them could be inferred from the fact that he attempted to suppress testimony in a case in which they (but not he) were defendants; and that the conviction of this petitioner was proper even though the only defendant with whom he could possibly have conspired was acquitted.

The Circuit Court left unanswered the contention that fatal variance results where an indictment alleges one large conspiracy and the proof in its most favorable aspect reveals two or more smaller conspiracies with no common members.

The Circuit Court also held that a prosecution witness may on direct examination corroborate his testimony by a

prior consistent statement, though his credibility has not been attacked.

B. Jurisdiction.

Petitioners were convicted of violating Section 88 of Title 18 U. S. C. This Court's jurisdiction rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

C. Questions Presented.

1. May defendants in a criminal case be placed on trial a second time under the same indictment when the record reveals no reason for the discharge of the jury at the first trial?

2. Does the decision of this Court in *Berger* v. *U. S.*, 295 U. S. 78, holding that fatal variance does not exist where two conspiracies with a common member are proved, apply to a case where the conspiracies have no common member?

3. Where a person not a defendant in a criminal case seeks to suppress testimony in that case, is this fact alone sufficient to convict him of conspiring with those who were actually defendants?

4. If a prosecution witness is permitted on direct examination and before his credibility is attacked to corroborate his testimony by a prior consistent statement, is the error harmless because the jury may have believed his story without the corroboration?

D. The Reasons Relied on for the Allowance of the Writ.

The first of the questions presented is one of first impression in the Federal courts, and bears on an important Constitutional right. The decision of the Circuit Court of

Appeals appears to be in conflict with the general doctrine laid down by this Court in *United States* v. *Perez,* 9 Wheat. 579 (1824). The second question involves the scope of a leading decision of this Court in a vital particular. As to the third question, the decision of the Circuit Court of Appeals is contrary to the doctrine many times laid down by this Court and most recently affirmed in *United States* v. *Falcone,* 311 U. S. 205 (1940), that knowledge of conspiracy must be brought home to the defendant. The fourth question relates to the emasculation by the Circuit Court of Appeals of the rule of *Ellicott* v. *Pearl,* 10 Pet. 412, 438 (1836).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Second Circuit in the case there entitled United States of America, Appellee, *vs.* Irving Potash, Joseph Winogradsky, Useratos Vafiades and Louis Hatios, Defendants-Appellants; and that said case may be reviewed and determined by this Court and the decision therein reversed; and that your petitioner may have such other or further relief as to this Honorable Court may seem appropriate.

Dated, April 23, 1941.

Respectfully submitted,

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

by KENNETH E. WALSER,
Attorney.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES and LOUIS HATIOS,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion has not yet been reported. It appears at R. 843.

II.

Jurisdiction.

1.

The statutory provision is Jud. Code, Sec. 240(a) (28 U. S. C., Sec. 347, as amended by the Act of Feb. 13, 1925, 43 Stat. 938).

2.

The date of the order for mandate was March 26, 1941 (R. 849).

III.

Abstract of Case.

Petitioners were convicted of violating Section 88 of Title 18 U. S. C. (Act of March 4, 1909), which is as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The offense against the United States which petitioners allegedly conspired to commit is prescribed by 18 U. S. C. 241 (Act of March 4, 1909), which provides as follows:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The pending case in which petitioners were alleged to have intimidated witnesses was an anti-trust case prosecution of the Needle Trade Workers Industrial Union and various individuals associated with it. The petitioners Potash and Winogradsky were defendants in that case. (Their conviction was reversed by the Circuit Court of Appeals (*U. S.* v. *Gold*, 115 F. 2d 236) and the indictment was thereafter dismissed.) The other two petitioners were merely union members.

Petitioners were charged with having conspired to corrupt witnesses in the anti-trust case.

On the trial of the case at bar one Loukas, who was engaged in a struggle against the union, testified as to attempts made by petitioners Potash and Vafiades to get him to leave the country before the trial of the anti-trust case, and a threat by petitioner Winogradsky. Petitioner Hatios, according to the Government's proof, warned one Tsaras not to "go against" Ben Gold, a defendant in the anti-trust case. Tsaras was not called as a witness for the Government in that case. No connection was shown between the acts of petitioner Hatios and those of the other petitioners, except that all belonged to the same labor union. The Circuit Court of Appeals held that Hatios was in the same conspiracy with the other petitioners because "It is most probable that he would not have done so unless inspired by those who were defendants (in the anti-trust case)" (R. 846), even though Gold, whom he was trying to protect, was acquitted in the case at bar of having conspired with him. Nor did the Circuit Court find a fatal variance, though the opinion contains no discussion of the point.

Loukas, the principal Government witness, was permitted on direct examination to testify as to a prior statement he had made to Federal Bureau of Investigation officials, which he said was the same as his testimony on the stand.

This was a clear violation of the long established rule that corroboratory statements are admissible only when the issue of fabrication has been raised. *Ellicott* v. *Pearl*, 10 Pet. 412 (U. S. 1836). The Circuit Court of Appeals recognized the rule but held that its violation did not require reversal because "If the jury believed his testimony, such corroboration added nothing; if they did not, it could not have changed their minds" (R. 848). This is true in every case, and the rule is thus wholly nullified.

I.

The plea of former jeopardy should have been sustained.

At the first trial the jury was discharged during their deliberations. The docket entry shows merely that on June 28, 1940 "At 12:45 P. M. the jury is discharged and mistrial ordered" (R. 7). The stenographic record which was attached to the plea of former jeopardy interposed by the defendants at the commencement of the second trial shows that eleven jurors returned to the court room without reporting a verdict or a disagreement, and the Court on its own motion and without the request or consent of defendants' counsel, and without stating any reasons or making any judicial inquiry, discharged the jury with thanks, stating that he felt "very badly about the outcome of this" (R. 18). When the defendants interposed their plea on being placed on trial a second time the plea was summarily overruled by the Court (R. 48, 22) with an exception to all defendants (R. 48). In opposing the plea the Government counsel merely stated that "There was no final adjudication to the previous trial; consequently no

former jeopardy. . . . We feel that the discharge of the jury was entirely within the discretion of the Trial Court" (R. 47-48). The overruling of the plea of double jeopardy was assigned as error (R. 819).

In *U. S.* v. *Perez*, 9 Wheat. 579 (1824), Mr. Justice Story laid down the rule that courts may discharge juries when there is a "manifest necessity" so to do, saying that "it is impossible to define all the circumstances, which would render it proper to interfere", but that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes" (p. 579). This case has always been followed. *Keerl* v. *State of Montana*, 213 U. S. 135, 137 (1909).

The question as to what constitutes "manifest necessity" has arisen for decision by appellate courts whenever a defendant has appealed from a judgment of conviction at a second trial, at which he pleaded former jeopardy by reason of an improper discharge of the jury at the first trial. In these cases the appellate court has had to determine *from the record* whether "manifest necessity" existed. The cases will be found collected in *Cornero* v. *U. S.*, 48 F. (2d) 69 (C. C. A. 9, 1931), *U. S.* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937), and (Note) 38 A. L. R. 706. It would serve no purpose to analyze these cases to ascertain what is "manifest necessity" and what is not, since the record at the first trial is silent as to the reason for the discharge.

Under these circumstances the authorities hold that the appellants must be regarded as having been put twice in jeopardy.

In the absence of Federal authorities, resort must be had to the common law (*Hanley* v. *U. S.*, 123 Fed. 849 (C. C. A. 2, 1903)), or according to some Federal courts, to the common law of the state where the case is tried, as

modified by statute. (*Avila* v. *U. S.*, 76 F. (2d) 39 (C. C. A. 9, 1935); *U. S.* v. *Olmstead*, 7 F. (2d) 756 (N. D. Wash., 1925); *U. S.* v. *Eagan*, 30 Fed. 608 (E. D. Mo., 1887).)

According to the general common law, there is double jeopardy if it appears that the jury was discharged at the first trial without the reason for discharge appearing on the record. Not only does the legal effect of the circumstances constituting the reason for the discharge determine whether the prosecutor may put the defendant again on trial, but the absence of record would foreclose review as to whether "manifest necessity" existed, thus fostering "an absolute and uncontrollable, instead of a legal discretion" (*Poage* v. *State*, 3 Ohio St. 229, at p. 240 (1854)).

In New York the common law rule has been codified in Section 429 Crim. Code, which provides:

> "Whenever the jury is discharged without a verdict, the reason for the discharge must be entered on the minutes."

Cf. *Peo.* v. *Barrett*, 2 Caines 304 (N. Y., 1805).

The common law rule is of long standing and well established. A typical statement of it is found in *State* v. *Allen*, 59 Kan. 758, 760, 54 Pac. 1060 (1898):

> "In this case it is contended that one of the recognized statutory grounds or necessities for discharge appears—that is, the inability of the jury to agree; and if we could look beyond the record a basis for this contention might be found. The rule, however, in cases involving the liberty of the citizen, and especially in cases of felony, is that the essential facts upon which the discharge is based, and the finding of the court thereon, must be entered of record; and unless the record shows the existence of such facts and the decision of the court thereon, and that they constitute sufficient ground for discharge,

the defendant cannot again be put on trial for the same offense."

Other cases to the same effect are *State* v. *Jefferson,* 66 N. C. 309 (1872); *Peo.* v. *Parker,* 145 Mich. 488, 108 N. W. 999 (1906); *Ex parte Maxwell,* 11 Nev. 428 (1876); *Wright* v. *State,* 35 Tex. Crim. Rep. 158, 32 S. W. 701 (1895); *State* v. *Klauer,* 70 Kan. 384, 78 Pac. 802 (1904); *State* v. *Bilton,* 156 S. C. 324, 153 S. E. 269 (1930); *State* v. *Wiseman,* 68 N. C. 203 (1873); *State* v. *Leunig,* 42 Ind. 541 (1873); *Mitchell* v. *State,* 42 Ohio St. 383 (1884); *State* v. *Smith,* 44 Kan. 75, 24 Pac. 84 (1890); *Poage* v. *State,* 3 Ohio St. 229 (1854); *Dobbins* v. *State,* 14 Ohio St. 493 (1863).

That the failure to object was not a waiver, see: *U. S.* v. *Watson,* 28 Fed. Cas. 16,651 (S. D. N. Y., 1868); *Ex Parte Glenn,* 111 Fed. 257 (C. C. W. Va., 1901), rev'd on other grounds, 189 U. S. 506 (1902); *Peo. ex rel. Stabile* v. *Warden,* 139 App. Div. 488, aff'd 202 N. Y. 138 (1911); *Cliett* v. *State,* 167 Ga. 835, 147 S. E. 35 (1929); *State* v. *Richardson,* 47 S. C. 166, 25 S. E. 220 (1896); *Mullins* v. *Comm.,* 258 Ky. 529, 80 S. W. (2d) 606 (1935); *Hipple* v. *State,* 191 S. W. 1150 (Texas Ct. App., 1917).

The Circuit Court of Appeals (R. 844) purported to find the reason for the jury's discharge in the record, stating "The inference is obvious that the mistrial was ordered because one of the jurors had become incapacitated to continue with the case before the jury had completed its deliberations", drawing this inference from the fact that the record shows that eleven jurors returned to the courtroom. Such an inference is wholly speculative. The juror may have been incapacitated and he may not.

While serious illness of a juror or other compelling urgency may, under certain circumstances, establish a manifest necessity for the discharge of a jury, the court must

judicially ascertain the nature, extent and seriousness of the illness and judicially determine whether it sufficiently warrants the discharge of the jury. To make such a finding the record must clearly show such facts. The defendant has a stake in such ascertainment and determination. The Court cannot arbitrarily determine such a question, *ex parte,* or without making a record.

Again, the Circuit Court of Appeals found that the petitioners had failed to sustain the burden of proof of their plea. While defendants of course have the burden of showing that no "manifest necessity" existed for the discharge of the jury where the facts are known, they could not conceivably have such burden where the reason for the discharge was not disclosed to them.

II.

The proof adduced was of two separate conspiracies and there was a fatal variance.

The petitioners contended below that, taking the evidence most favorably to the Government, the proof showed three distinct conspiracies, one between the petitioners Potash and Vafiades, one in which petitioner Winogradsky conspired, if at all, with persons unknown, and one in which petitioner Hatios conspired with defendant Gold. In order to make the point clear without too long an exposition, we call attention only to the testimony against Hatios. It will be recalled that he was not a defendant in the anti-trust case, and his only connection with the defendants in that case was that he belonged to the same union. The Government's evidence against him was that he told a prospective witness in the anti-trust case who was confined to Ellis Island that he could get out on bail if he would "do what Ben Gold says" (R. 411). The witness's fiancee

said that petitioner Hatios told her to influence the prospective witness "not to go against Ben Gold . . . and if he says anything in this court he will be marked as an informer down at the market" (R. 451, 452). Ben Gold was a defendant in the anti-trust case and also in the case at bar. In the case at bar he was acquitted.

Petitioners therefore contended below that the conspiracy between Hatios and Gold, if there was one, was necessarily a separate and distinct conspiracy from that between the other petitioners; and petitioners urged that this was a fatal variance, and that the rule of *Berger* v. *U. S.*, 295 U. S. 78 (1934), did not apply. In that case this Court held that proof of two separate conspiracies was not a fatal variance if there was a common member of each. There Rice, Katz, Berger and Jones were indicted for conspiracy to utter counterfeit bills. Rice, who was the engraver, conspired with Katz to utter the false bills to buy rings from persons advertising them for sale. Berger, unknown to Rice, approached Katz and introduced to him Jones who passed the bills to tradesmen. There were thus two conspiracies of which Katz was the common member. This Court in holding that there was no fatal variance called attention to the fact that "the only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both" (p. 80).

In the case at bar there was no connection whatever between the petitioner Hatios and the other petitioners, except that they belonged to the same union. As to this, as was pointed out to the Court below, Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. 106, provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United

> States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

The Circuit Court of Appeals did not discuss the Berger case because they found Hatios to be in the same conspiracy as the other defendants. They said: "As to Hatios the case is less clear; but it is pertinent to ask why he had busied himself in endeavoring to suppress testimony in a prosecution in which he was not a defendant. It is most probable that he would not have done so unless inspired by those who were defendants" (R. 846). We submit that this holding not only extends the rule of the Berger case to conspiracies of which there is no common member, but that it convicts petitioner Hatios by an inference which must be based on the proposition that he is guilty until he is proved innocent. The Circuit Court of Appeals in effect held that one who endeavors to suppress testimony in a criminal case to which he is not a party is automatically guilty of conspiracy with all the defendants in that case without other proof. This is contrary to the doctrine of this Court laid down in *U. S.* v. *Falcone,* 311 U. S. 205 (1940). If Hatios was not in the same conspiracy, there is a variance which was necessarily and obviously prejudicial.

Moreover, if Hatios was in a conspiracy at all, he conspired with the acquitted defendant Gold. The conviction of one defendant cannot be sustained if the other party to the conspiracy was acquitted. *United States* v. *Austin-Bagley Corp.,* 31 F. (2d) 229 (C. C. A. 2, 1929); *Feder* v. *United States,* 257 Fed. 694 (C. C. A. 2, 1919).

It is submitted that the reasoning by which Hatios was found by the Circuit Court of Appeals to be a co-conspira-

tor is violative of the presumption of innocence. He could in fact have conspired only with Gold, who was acquitted. His conspiracy had no common member with the other conspiracy, and the rule of the *Berger* case cannot be extended to him.

III.

An important rule of evidence has been nullified.

On the direct examination of the Government witness Loukas, he was asked whether during the anti-trust trial he went to the Federal Bureau of Investigation and made "a 15 or 16 page statement which set out all the facts or practically all the facts which you testified to here today" (R. 110). Objection was overruled and exception taken (R. 111). Again at R. 111 he was asked whether on March 21, 1940, during the anti-trust trial he sat down with an F. B. I. agent and set out in detail everything that took place from February 5 to March 20. Objection was overruled and exception taken. He was then asked, likewise over objection and exception, whether he went back to the Federal Bureau of Investigation, read his statement and put his name on the bottom of every page and signed the last page (R. 112). Finally, he was asked whether he had from time to time before he took the witness stand in the case at bar read through a copy of the statement to refresh his recollection (R. 113). He answered that he had. The statement itself was offered and excluded (R. 114), but the inescapable inference was left that it was the same as the testimony which the witness had just given (R. 110).

Ever since *Ellicott* v. *Pearl,* 10 Pet. 412, 438 (1836), it has been the rule that where a witness's testimony is, in the words of Mr. Justice Story, "assailed as a fabrication

of a recent date, * * * in order to repel such imputation, proof of the antecedent declaration of the party may be admitted". *Boykin* v. *United States,* 11 F. (2d) 484 (C. C. A. 5, 1926); *Robb* v. *Hackley,* 23 Wend. 50 (N. Y., 1840); *Yoder* v. *U. S.,* 71 F. (2d) 85, 87 (C. C. A. 10, 1934). The Circuit Court of Appeals found that this rule had been violated in the instant case, but that the error was not sufficiently prejudicial to justify reversal (R. 848). We call particular attention to the reasoning of the Court which said:

> "If the jury believed this testimony, such corroboration added nothing; if they did not, it could not have changed their minds."

It is always the case that if the jury believes the testimony in chief of the witness, corroboration adds nothing. If this new rule is applied, there will be no case where improper corroboration of a witness who has not been attacked will be prejudicial error. All sorts of corroboration will be adduced to support witnesses on direct examination, because the answer may always be made that perhaps the jury believed his story without the corroboration. A new rule has thus been laid down in the Second Circuit, which nullifies the rule of *Ellicott* v. *Pearl, supra.*

The Court, in the exercise of its supervisory powers, should grant a writ of certiorari to review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

KENNETH E. WALSER,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 989

IRVING POTASH, JOSEPH WINOGRADSKY, USERATOS VAFIADES, AND LOUIS HATIOS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 843–849) is reported at 118 F. (2d) 54. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1941 (R. 849). The petition for writ of certiorari was filed April 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the Constitution of the United States provides in part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *

QUESTIONS PRESENTED

1. Whether the record of the petitioners' first trial suffices to disclose why the jury was discharged and, if not, whether the mere failure of the record to make such a disclosure affords an adequate basis for a plea of double jeopardy at a second trial for the same offense, in the absence of any effort to show that the trial court abused its discretion in discharging the jury.

2. Whether the evidence against the petitioner Hatios sufficed to permit the jury to find that he was a party to the conspiracy charged in the indictment.

3. Whether it was reversible error to permit a witness to testify that he had made a prior written statement of the facts to which he testified on the trial, when the testimony was admitted solely to show the basis of the witness' recollection of details and the written statement itself was not received in evidence.

STATEMENT

On May 14, 1940 (R. 4) an indictment in one count (R. 11–15) was returned against petitioners and seven others in the District Court for the Southern District of New York. It charged that the defendants conspired corruptly to influence and intimidate various witnesses in a criminal prosecution for violation of the antitrust laws,[1] which had been brought against some of the present petitioners and others, and to obstruct and impede the due administration of justice therein.

The defendants pleaded double jeopardy (R. 16–17). The plea alleged that on June 17, 1940, the defendants were placed on trial on the same indictment; the case was submitted to the jury on June 27; the jury deliberated from about 4 P. M. on June 27 until 12:43 A. M. on June 28, when it was locked up for the night, and from 10 A. M. until 12:45 P. M. on June 28; that eleven of the twelve jurors returned to the courtroom and were discharged by the court; they "did not report a verdict and they did not report a disagreement." Attached to the plea was a copy of the stenographic record of proceedings on June 28, when the jury was discharged (R. 18–21). The trial court overruled the plea (R. 22, 47–48).

[1] *United States of America* v. *Needle Trades Workers Industrial et al.*, Criminal No. C 95–925, United States District Court for the Southern District of New York, indictment filed November 6, 1933 (R. 12, 54).

The prosecution was dismissed as to one of the defendants (R. 7). Four were acquitted by the jury and six were convicted (R. 8, 801). The petitioners were sentenced to imprisonment, Potash and Vafiades for two years (R. 23, 26), Winogradsky for fifteen months (R. 25), and Hatios for one year and one day (R. 24). Their convictions were affirmed by the Circuit Court of Appeals, which set aside the conviction of Kochinsky (R. 843–849).[2]

The case against the petitioners rested upon the following evidence:

During 1938 Louis Loukas, who had been associated with the defendants in the antitrust case since 1926 (R. 73–76), indicated to a Special Assistant to the Attorney General that he was prepared to testify for the Government (R. 83). On October 20, 1939, notices were transmitted to the various defendants, including the petitioner Winogradsky, that the antitrust case was being moved for trial (R. 61–62). At about the same time Winogradsky approached Loukas in what is known as the fur district of New York City and greeted him, "Hello, G-Man" (R. 84). Winogradsky told Loukas that the union officials were aware that Loukas was assisting the prosecuting authorities in New York County and the Antitrust Division of the Department of Justice (R.

[2] Karpouzas' appeal was dismissed by stipulation not of record.

84–85), and said (R. 85): "If you will be a nice boy you will work. If you want to work for the government you will starve. * * * I will give you a week to think. * * * Make up your mind and let me know."

About a week thereafter Winogradsky again approached Loukas and told him that if he wanted to be a "wise guy" he could ask the government to feed him, otherwise the union would cut off his supplies and he would be unable to work in the industry (R. 86). He said: "We have not bothered you up to now. We don't have to come out to Jersey (Loukas had a fur shop in New Jersey at that time). All we have to do is stop Feil."[3] Loukas answered that if the government called him he would have to talk (R. 86), and that "it was a week later that I fell down and went boom, they cut my supplies" (R. 161).

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[3] Prior to that time from 1935 through 1939, Feil, a fur manufacturer, had been sending piece work to Loukas (R. 77). Such an arrangement was in violation of Feil's contract with the Fur Workers' Union (R. 77–78), but was well known to petitioner Potash, who had talked to Loukas about it in 1937 (R. 79). In all the years before Winogradsky's conversation with Loukas in October 1939, no disciplinary action had ever been taken by the union against the Feil Fur Company because of its relationship with Loukas (R. 79–80, 300). In November and December of 1939 and January of 1940, Feil was brought before a joint board of manufacturers and union officials to answer charges (R. 300) and a fine of $3,150 was levied upon him by the impartial chairman (R. 300–301, 308–309). The union, through petitioners Potash and Winogradsky, had recommended to the impartial chairman that Feil be fined about $8,000 (R. 715–716, 752).

Loukas thereafter met Potash and Vafiades (R. 89, 258–259, 677, 727–728). Potash told Loukas that he and his wife should take a trip to Europe or Mexico and that the union would supply all the necessary funds. Loukas said he would not do it (R. 93). Potash told him that he was not bound by the statements that he had made to the Special Assistant to the Attorney General, inasmuch as he had not testified under oath before the grand jury (R. 94).

During the same conversation, Potash said that, since Loukas was friendly with Soulounias who also was to appear as a government witness in the antitrust case, he wished Loukas would go to Soulounias and request him to go to Mexico with his family. When Loukas remarked that Soulounias was "broke" Potash replied, "Don't be a fool; we will take care of it" (R. 92). Loukas agreed to convey this message to Soulounias[4] (R. 91–93), and reported back to Potash that Soulounias "wanted to go through with the case" (R. 97). To this Potash responded, "We will take care of him. * * * Perhaps somebody else has more influence on him than you have" (R. 97).

[4] Loukas explained that he was willing to do this because he did not wish to be the only witness against the union and "being that Soulounias was a Communist, maybe he was a brother under the skin with them, so I was afraid he was going to leave me alone in the stand" (R. 208).

At this conference Potash outlined at length reasons why Loukas should, in no circumstances, testify against his old associates. He told him that he was jeopardizing his entire future in the fur industry, cited instances in which union members had fallen into difficulty with the authorities, had been bailed out, and had the charges withdrawn and emphasized that "We got pull" (R. 98–99).

At still another meeting a few days later at which Loukas, Potash, and Vafiades were present Potash asked Loukas to make "slips" on the witness stand, retract his testimony, and accuse Soulounias and the government attorneys of suborning perjury. Potash also warned Loukas that if he testified, Loukas would forever after be stigmatized as a "rat" by the workers in the industry (R. 101–102).

Vafiades met Loukas on two or three occasions thereafter, the last being while the antitrust case was being tried (R. 106–107), and again outlined the dire prospects for Loukas if he testified for the government and his promising future if he did not do so. Vafiades still endeavored to induce Loukas to change his testimony (R. 106–107).

Petitioners Potash and Vafiades attempted to influence Soulounias not only through Loukas, but also through George Perry, a fur manufacturer (R. 375–383). Vafiades told Perry that "they"

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wished to save Soulounias from becoming a "stool pigeon" and were willing to give him $2,000 if he would go either to a small town or to Mexico (R. 377, 378). Perry told Vafiades that Soulounias had said that he did not trust Vafiades and that he would only deal with Gold and petitioner Potash (R. 379). That same evening Potash called upon Perry and asked him to arrange a meeting between Soulounias and Potash (R. 379–380, 382). Perry arranged such a meeting, but Soulounias failed to appear (R. 382, 750).

The petitioners not only attempted to reach Soulounias through Perry, but also requested Perry to testify falsely in the antitrust case. At Potash's request Perry went to the union offices (R. 384, 610, 738). In Potash's private office, he told Perry that the government witnesses in the antitrust case were telling "lies and packs of lies * * * nothing but lies" (R. 384) and asked Perry to testify that Soulounias had come to him to obtain $5,000 or $10,000 from the defendants in return for Soulounias not testifying against them (R. 384–385).

While petitioners Winogradsky, Potash, and Vafiades were corruptly endeavoring to influence Loukas, Soulounias, and Perry, petitioner Hatios was pursuing the same course with another government witness, Thomas Tzaras. Tzaras had known the defendants in the antitrust case since 1926 (R. 408). He had fallen into difficulty with the law, lost his citizenship, and had been de-

ported. Thereafter he had illegally returned to the United States, and in January 1940 was held at Ellis Island under bail of $1,000, awaiting deportation to Greece (R. 409–411). While there, Tzaras was interviewed by a Special Agent of the Federal Bureau of Investigation and indicated that he was willing to testify for the government in the antitrust case (R. 412). Hatios called on Tzaras at Ellis Island twice and on the second occasion said, "If you could do what Ben Gold says * * * you can be bailed out from Ellis Island on $1,000 bail" (R. 411).[5] Tzaras replied that even if his bail were $50,000 he did not "want to do nothing to be obligated to them skunks again" (R. 412, 430–431). Tzaras was released from Ellis Island six months later on bail furnished by the brother of his fiancee (R. 416, 439).

Tzaras was engaged to Mary Athens, whom Hatios urged to use her influence with Tzaras to prevent him from testifying against Ben Gold, saying that if he did he would be branded as an informer in the fur market. She conveyed the warning to Tzaras (R. 407, 451–452).

Hatios had been for many years associated with the other defendants and had long been active with them in union affairs. He testified that he was in daily communication with the union headquarters throughout the period of his conversa-

[5] In 1929 Tzaras and Hatios were arrested together during some "labor trouble" and bail was obtained for them (R. 647–650).

tions with Tzaras, but Hatios denied that he had asked anyone at the union about arranging bail for Tzaras (R. 650–653).

Petitioners met with some success in their efforts to interfere in the antitrust prosecution. One witness,[6] who was paid $50 or $60 a week by a union official to stay out of town (R. 470, 474–475) cooperated to a considerable extent (R. 469–481). He revealed to the agents of the Federal Bureau of Investigation that he had received money and promises (R. 474–475) and agreed that he would not leave town and would testify in the antitrust case as to the facts which he had previously told government attorneys (R. 478). He testified for the Government (R. 56, 460). At the close of his testimony he rose to his feet and stated, "I have a statement to make, a full confession, that all my testimony was engineered by Mr. Soulounias and Mr. Whelan" (R. 463). Mr. Whelan was a Special Assistant to the Attorney General in the antitrust case. Karpouzas stated further that statements which he had made to Whelan in the presence of Soulounias in January 1940 were not true, that the answers to Whelan's questions had been supplied by Soulounias and not by Karpouzas, and that Whelan had told him to try his utmost to implicate Ben Gold. He also said that Mr. Whelan, during a noon recess in the antitrust suit asked him to return to the stand and attempt

[6] William Karpouzas, a defendant convicted below, whose appeal was dismissed by stipulation.

to implicate Gold and fit him into the picture as much as possible (R. 463–464).

Every person in a position to do so, Whelan, the agent of the Federal Bureau of Investigation, and the stenographer who made a stenographic report of the interview, testified to the falsity of Karpouzas' accusation (R. 480, 540–541, 567).

ARGUMENT

I

There is no merit in the petitioners' contention that their plea of former jeopardy should have been sustained on the record of the proceedings at the first trial.

The allegations of the plea and the docket entries showed that the case was submitted to the jury at the end of the first trial on June 27, 1940 (R. 7, 16). After deliberating until 12:45 A. M. on June 28, the jury was sent to a hotel for the night (R. 7, 16). At 12:45 P. M. on June 28, eleven jurors returned to the courtroom, the jury was discharged and a mistrial ordered (R. 7, 16, 18). The stenographic record of the proceedings on June 28, annexed to the plea, shows that when the eleven jurors returned, the court discharged them with the following statement (R. 18):

> I feel very badly about the outcome of this. I feel as though I had made wrecks of you. Of course, a judge has to do that and it is done with the best of intentions in the

> world. It is my duty, but if I could do it I would like to have your jury service to be a sort of pleasure instead of the way it has been. The only thing I can do under the circumstances is to thank you and say that I am very sorry it has not been more pleasant. I hope you will be rewarded the next time you serve by serving on a nice case on the civil side of the court. You are discharged with the thanks of the Court.

Petitioners' counsel were present and made no objection to the jury's discharge, nor did they request that a more complete record be made. And while defense counsel argued at some length with respect to a convenient date for retrial, they did not intimate that they thought the second trial would be barred (R. 18–21).

When, in the second trial, the court asked upon what ground the plea of former jeopardy was based, petitioners' counsel replied: "The ground is simply upon the record of the trial as disclosed on June 28, 1940" (R. 47). Thereupon the court stated that it was his understanding that in the previous case, "one of the jurors was taken seriously ill and incapacitated and could not continue with the case, and therefore the judge had to declare it a mistrial. That is the situation, isn't it?" Counsel for petitioners refused to respond, except to repeat that they stood "upon the record" (R. 47). The court thereupon overruled the plea (R. 48).

1. Petitioners argue that the record of the first trial does not show why the jury was discharged

and that, for that reason, their plea must be sustained. We think the court below correctly held that "the inference is plain that one of the jurors was incapacitated to continue" (R. 845). If, as we believe, the record sufficed to sustain this inference, it is impossible to argue that it is silent as to why the jurors were discharged. Hence, even if the record must show the cause of the discharge, we submit that a sufficient showing is made. It is significant, in this connection, that petitioners' attack is leveled only at the sufficiency of the record, not at the correctness of the inference drawn from what the record shows.

2. In any event, we deny that a plea of double jeopardy must be sustained merely because the record is silent as to the cause for the jury's discharge. While there is some authority so holding in the state courts,[7] there are no federal decisions

[7] Of the state decisions cited by petitioners, only *Ex parte Maxwell*, 11 Nev. 428 (1876) and *Wright* v. *State*, 35 Tex. Crim. 158 (1895) do not rely, in part at least, upon a statutory requirement that the judge enter the reasons for the discharge of the jury on the record. *State* v. *Smith*, 44 Kan. 75 (1890); *State* v. *Allen*, 59 Kan. 758 (1898); and *State* v. *Klauer*, 70 Kan. 384 (1904), although they rest upon no statute of this sort derive from a Nebraska decision which was based upon such a provision. See *State* v. *Smith*, *supra*.

In many of the other cases the reason for the jury's discharge appeared from the record; the case where the record is silent was explicitly left open. See *Poage* v. *State*, 3 Ohio St. 229, 239 (1854), a case heavily relied upon by petitioners; *Dobbins* v. *State*, 14 Ohio St. 493, 501–502, 505 (1863); *Mitchell* v. *State*, 42 Ohio St. 383 (1884); *State* v. *Jefferson*, 66 N. C. 309, 313 (1872); *State* v. *Wiseman*, 68 N. C. 203,

and the rule advanced is patently unreasonable as an interpretation of the Fifth Amendment. Whether a jury should be discharged for failure or inability to agree rests within the discretion of the trial court; a second trial constitutes double jeopardy only if discretion was abused (Cf. *United States* v. *Perez*, 9 Wheat. 579; *Thompson* v. *United States*, 155 U. S. 271, 273; see also *Cornero* v. *United States*, 48 F. (2d) 69 (C. C. A. 9th)). The accused has the burden of proving a plea of double jeopardy (*Kastel* v. *United States*, 23 F. (2d) 156, 157 (C. C. A. 2d), certiorari denied, 277 U. S. 604); it is therefore incumbent upon him to show that there was an abuse of discretion.[8] In making

206–207 (1873); *State* v. *Leunig*, 42 Ind. 541, 542–543 (1873); *State* v. *Bilton*, 156 S. C. 324, 335 (1930); *People* v. *Barrett*, 2 Caines 304 (N. Y., 1805); and *People* v. *Parker*, 145 Mich. 488 (1906), with which compare *In re Ascher*, 130 Mich. 540 (1902) and *People* v. *Sharp*, 163 Mich. 79 (1910).

Other decisions hold that the court need make no record of its reasons for discharging the jury, *People* v. *Greene*, 100 Cal. 140 (1893); *People* v. *Disperati*, 11 Cal. App. 469 (1909); that a judge may on his own motion discharge the jury when it is discovered by him that a juror is not qualified or that the court and counsel are related, *Minyard* v. *State*, 17 Ga. App. 398 (1915); *Walker* v. *State*, 19 Ga. App. 98 (1916); and that he may determine whether all the jurors are qualified and competent by a private, ex parte investigation, *In re Ascher*, 130 Mich. 540 (1902); *People* v. *Sharp*, 163 Mich. 79 (1910). See also *Winsor* v. *Queen*, L. R. 1 Q. B. 289, 390.

[8] That is, that there was no continued and manifest inability to agree upon a verdict (*United States* v. *Perez*, *supra*; *Logan* v. *United States*, 144 U. S. 263); no injury or casualty incapacitating any juror from continuing to sit

such a showing he is in no way prejudiced by the absence of a record, for it is clear that what actually occurred at the first trial can be proved even by parole (cf. *Dunbar* v. *United States,* 156 U. S. 185, 191; *Bartell* v. *United States,* 227 U. S. 427; *Case* v. *United States,* 6 F. (2d) 530, 531 (C. C. A. 9th)). In other situations the record may be supplemented, though not impeached, by extrinsic evidence (see *Riddle* v. *Dyche,* 262 U. S. 333). To deny that this may be done when double jeopardy is involved would defeat adjudication on the merits on wholly irrational grounds.

II

Petitioners contend that the evidence showed not the single conspiracy charged in the indictment, but three separate conspiracies: One between Potash and Vafiades, another between Winogradsky and persons unknown, and a third involving only Hatios and Gold (Pet. 12–15). Upon this premise, they argue that since no member was common to each conspiracy, as in *Berger* v. *United States,* 295 U. S. 78, there was a fatal variance.

(*United States* v. *Haskell*, 26 Fed. Cases, No. 15321, 1823); no injury or casualty suffered by the judge or any of counsel (*Freeman* v. *United States*, 237 Fed. 815 (C. C. A. 2d, 1916)); no disqualification of a juror (*United States* v. *Thompson*, *supra; United States* v. *McCunn*, 36 F. (2d) 52, S. D. N. Y., 1929; *Gardes* v. *United States*, 87 Fed. 172 (C. C. A. 5th, 1898)); and no fatal defect in indictment or information (*Simpson* v. *United States*, 229 Fed. 940 C. C. A. 9th, certiorari denied, 241 U. S. 668).

We think it is clear that there was no variance between the indictment and the proof which has "substantially injured" any of the petitioners. *Berger* v. *United States, supra,* p. 81. As the Circuit Court of Appeals held (R. 845–846), there "can be no doubt" of the nexus between Potash, Vafiades, and Winogradsky. Each of them participated as principal members in the common scheme to intimidate and corrupt Loukas and other government witnesses, and petitioners do not expressly contend otherwise. It is only as to petitioner Hatios, concerning whom the court below said the evidence was "less clear" (R. 846), that the question of a so-called variance is seriously urged, but it is settled that the failure to connect all of the alleged conspirators with the conspiracy does not work a fatal variance. *Cooper* v. *United States,* 91 F. (2d) 195, 198 (C. C. A. 5th).

The contention, therefore, reduces to the proposition that the evidence was insufficient to permit the jury to find that Hatios conspired with anyone but Gold, who was acquitted. But the evidence established not only that Hatios sought, both directly and indirectly, to influence the testimony of the government witness Tzaras (R. 404–407, 411–416, 450–453). It also showed that he was an associate, both in business and in union activities, with the men accused or interested in the antitrust case, including the other petitioners (R. 650–653). Under these circumstances, the jury was certainly free to conclude that his action directed toward the common end was taken in con-

cert with them.[9] (Cf. *Reavis* v. *United States,* 106 F. (2d) 982 (C. C. A. 10th); *Allen* v. *United States,* 4 F. (2d) 688, 691 (C. C. A. 7th); *Jezewski* v. *United States,* 13 F. (2d) 599, 602 (C. C. A. 6th); *Wyatt* v. *United States,* 23 F. (2d) 791, 792 (C. C. A. 3d)). *United States* v. *Falcone,* 311 U. S. 205, is plainly distinguishable. The sale of innocent articles in that case was far from equivalent to Hatios' effort to corrupt Tzaras; the association evidence, therefore, had very different probative force.

III

Petitioners object to testimony in the record with reference to the existence of a written statement which the witness Loukas had given prior to trial to the Federal Bureau of Investigation. This statement was not received in evidence (R. 115–116) nor was any testimony given as to its contents other than the unelaborated declaration that it set out in detail the same facts to which Loukas testified on the trial, and that he had read it over before testifying (R. 113).

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[9] The rights of each defendant were plainly protected by the charge, which was as follows: "You must consider the evidence separately as it exists as to each defendant. If the proof shows that some defendants committed some unlawful act or wrongful act, but he did not participate in the plan, agreement or conspiracy with other defendants, you must return a verdict of not guilty as to such defendant. If you have a reasonable doubt as to whether or not a particular defendant was a party to the conspiracy, you must return a verdict of not guilty as to such defendant" (R. 795).

The record shows that the testimony complained of was provoked by petitioners' counsel during the course of Loukas' testimony, when counsel said:

> Mr. LEIBOWITZ. Your Honor, I object to all of these leading questions on the ground that he is being told now what to say. He has a most inexhaustible memory.
>
> Mr. DOYLE. Your Honor, I submit that counsel's remark should be stricken from the record.
>
> Mr. LEIBOWITZ. No, I think it is quite right, your Honor. I think it is quite evident to the Court and jury (R. 102).

Accordingly, the purpose of asking the witness if he had signed each page of the statement, as explained by the Government's attorney, was:

> A remark was made this morning as to the alleged memory and ability of this man to think and recall details. I believe that in all fairness the Government should point out through this witness how he is able to recall this testimony in such detail (R. 111).

It was for this purpose that the judge allowed the testimony, or, as the court said:

> I think it is a proper question. There has been some doubt cast upon his recollection and how he happened to remember all these details. This throws some light on how he came to remember it or how he happens to remember it (R. 113).

The Circuit Court of Appeals held that the testimony was inadmissible but concluded that the error was not prejudicial (R. 847–848). We are by no means clear that the trial court erred in admitting the testimony for the limited purpose of answering the imputation that the witness could not have remembered the details to which he had testified. In effect, he said no more than that he had refreshed his recollection. The written statement was not admitted in evidence. Accordingly, no hearsay problem is involved. That the statement itself would not have been admissible under the rule of *Ellicott* v. *Pearl,* 10 Pet. 411, 438, sanctioning the exceptional admission of prior consistent statements when there is a charge of recent fabrication (see IV *Wigmore on Evidence* (3d ed.) sec. 1129) is obviously beside the point. But even if the questions as to the existence of the statement and its use to refresh recollection were improper, we see no escape from the conclusion that the testimony could have had little effect upon the jury's ultimate decision.[10]

[10] Moreover, any influence this testimony may have had with the jurors plainly was dispelled by the statement to the jury made by counsel for petitioners just after the trial court had sustained his objection to the admission of the written statement: "Mr. Leibowitz: Well, so that the *jury* does not get the idea that I am technical about this thing here—he is making a statement, and I just want to say this, your Honor, without trying to be captious or presume upon your Honor's patience. Our position is that it does not make any difference what statement he made. We claim that he is not

Indeed, the petitioners' major complaint is directed against the language employed by the court below to express the view that the error was not prejudicial.

It may be said, in addition, that petitioners' argument on this point, like their other contentions, ignores the requirement that the Court must give judgment without regard to technicalities which "do not affect the substantial rights of the parties." Section 269 of the Judicial Code (c. 48, 40 Stat. 1181; 28 U. S. C., Sec. 391).

CONCLUSION

This case was correctly decided below, there is no conflict of decisions and there is involved no important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1941.

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telling the truth. He can make any statement he likes to 50 Government agents; that does not prove he is telling the truth. That is our position" (R. 115). [Italics supplied.]

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